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Shirley Ottman, an individual v. Kenneth Baldwin, an individual, and Collette Baldwin : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

SHIRLEY OTTMAN, an individual, Plaintiff-Appellant, vs. KENNETH BALDWIN, an individual, and COLLETTE BALDWIN, an individual Defendants-Appellees.	**REPLY BRIEF OF THE APPELLANT** (ORAL ARGUMENT REQUESTED) Case No. 20060209

Appeal from a Final Judgment
of the Third District Court in and for Salt Lake County, Utah
The Honorable Anthony B. Quinn

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SUMMARY OF REPLY ARGUMENT

Trial testimony from both sides clearly establishes that the Defendants' wall was constructed straddling the stake identified in picture exhibits "E" and "F", which marked the metes and bounds boundary between the parties' properties. Thus even if the Defendants were to prevail regarding the location of the property boundary, they still constructed their wall in part on Plaintiff's property. Consequently part of the Defendants' wall, its footings, and associated excavation trespass on Plaintiff's property, and the lower court erred when it failed to find an encroachment and failed to conclude that the encroachment was a trespass under the law.

The Defendants' theory that there may have possibly been a second fence line running along the metes and bounds line is admittedly not based on any individual's personal knowledge, but based entirely on the hypothetical conjecture of Defendants' expert that at one time another fence may have possibly existed. The new theory is contrary to unchallenged trial testimony from Ken Howcroft and Marvin Widerberg regarding the precise location of the old fence that has served as the property boundary for decades. Based on the unchallenged evidence and testimony presented at trial, the lower court erred when it failed to find that a boundary had been created by monument long before the Defendants acquired their property.

There was no evidence at trial that there were two monuments, and the lower court

was not faced with a decision to choose between two competing fences. The Plaintiff presented evidence to the lower court of the personal knowledge of several witnesses regarding the old fence that marked the boundary. The Defendant only presented what was admitted to be conjecture from the Defendants' expert that there may at one time have possibly been another fence.

The Plaintiff presented unchallenged testimony from Ken Howcroft that the northernmost post of the chain link fence he personally installed was buried in the very same posthole where the old fence post was removed. Defendants did not present any witness who could testify that the northernmost fence post of the chain link fence was not in fact placed in the very hole where the old fence post was buried. Plaintiff also provided the testimony of Marvin Widerberg regarding the precise location of the old fence parallel to an irrigation line he supervised the installation of in 1986. Mr. Widerberg located the irrigation line four feet west of the northernmost fence post of the chain link fence. The Defendants did not present any witness who could testify regarding the location of the irrigation line. The combined testimony of these two witnesses irrefutably establishes the precise location of a portion of the old fence line exactly where Plaintiff contends it was located.

Contrary to Defendants' contention, the old fence, as well as the boundary call for Red Birch Estates, does not follow a single straight vector. Defendants' expert admitted that the old fence line he found bowed away from the metes and bounds line. This is

consistent with evidence presented by both sides that the old fence line ran from the southwest corner of the Pardoe property (located to the north of Plaintiff's parcel), going southward, passing over the location of the northernmost fence post of the chain link fence, and connecting on the south to the northeast corner of Farmbrook Estates subdivision (located to the south of Defendants' parcel). Plaintiff's position is that the boundary should simply connect the property to the north with the property to the south, passing through the undisputed location of one of the old fence posts from the original old fence line (bowing slightly to the west).

The lower court should have considered conflicting testimony of Defendants' expert when Plaintiff's attorney read part of his deposition during closing argument because it was read during cross examination, and the court mistakenly believed Defendants' attorney when he objected, claiming that it had not come in as evidence at trial. The portion of the deposition read in cross-examination established that it was previously the Defendants' position that the north end of the eastern boundary of Farmbrook Estates (immediately to the south of the disputed boundary) followed the old fence line. This is a critical piece of evidence in showing that the Defendants' had changed their theory at trial and that the boundary should connect the corner to the north with the corner to the south. If indeed the northern end of the eastern boundary of Farmbrook Estates is along the old fence line, then the correct location of the old fence line and the boundary in dispute extends to the north from the northeast corner of

Farmbrook Estates. This is some seven feet to the west of where the Defendants have asserted is the location of the boundary. Plaintiff believes that this evidence, if properly considered by the lower court, would have prevented the lower court from being persuaded by the Defendants' new theory.

Furthermore, portions of Mr. Peterson's prior testimony show unquestionably that he changed his story on the second day of trial and this should have been considered by the lower court because the new theory was unveiled for the first time on the second day of trial, and Plaintiff's attorney was unable to prepare for this surprise new theory on the spur of the moment during cross examination, but was able to reveal the full truth to the trial court during his closing argument.

ARGUMENT

I. The Baldwin's wall encroached on the Ottman property.

Defendants argue that the orange stake identified in Defendants' Trial Exhibits "E" and "F" (clearly inside the forms for the Defendants' wall) identified the line on which the chain link fence was installed. Brief of Appellees states: "Robert Jones, who placed the orange stake, testified that the stake marked the projected path of the chain link fence." See Brief of Appellees p. 24. This is not true and is contrary to clear and unambiguous testimony from Robert Jones. Bob Jones's testimony in this regard is the most clear:

> Q. Now there was a picture introduced into evidence yesterday, Exhibit E I'd like to show you and also Exhibit F.
> A. Okay.

Q. Do you recognize that there's a stake painted orange in those footings?
A. I do.
Q. Do you have knowledge of how that stake got put there?
A. Yes, we ran that subdivision line when we went out there to tie in what might have been left of the old fence line if there were anything so we could orient ourselves to that and to the subdivision **and that's a stake that we put in on the subdivision line**.
Q. So your testimony is that the reason that stake was put in there was **to locate the boundary that was claimed by the Baldwins**?
A. **The subdivision, yes sir**.

Record at 820 at pp. 226:17-227:16 (emphasis added). The Court should not be persuaded by the Defendants' attempt to twist Mr. Jones' testimony. It is clear and unambiguous that the stake photographed in picture exhibits "E" and "F" marks the line that Defendants claim to be the boundary. This being the case, the wall clearly straddles the boundary line even if the Baldwins were correct as to the location of the actual boundary line.

The Defendants' misconstruction of Mr. Jones's testimony can only mislead the Court. As support for the misconstruction, the Brief of the Appellees quotes language discussing a different stake pictured in Plaintiff's trial picture exhibit 2, which was "close" to the chain link line (see Brief of Appellees p. 25). The stake pictured in Exhibit 2 is a different stake located some distance to the south of the stake pictured in Exhibits "E" and "F". Pictures "E" and "F" show a stake towards the northern end of the disputed area, where a wall was subsequently constructed. Picture 2 was taken after portion of the wall was built, and is looking northward past a stake in the ground, with the wall in the background (to the north). The wall in picture 2 sits on top of the location where the

stake seen in picture exhibits "E" and "F" used to be. The Court should not be confused by the Defendants' attempt to confuse the two. It makes no sense for Defendants to cite a description of a stake that is located towards the south end of the property, and treat it as if it were the same stake placed in the forms at the north end of the property where the wall was subsequently constructed prior to litigation.

Defendants also claim that Kenneth Baldwin testified that the orange stake marked the projected line of the chain link fence (see Brief of Appellees, pp. 7 ¶3, 25 ¶2). However, Defendants fail to acknowledge that Mr. Baldwin subsequently admitted that he did not know what line the stake actually marked because Robert Jones was the person who placed it there (Record at 819 pp.130: 13-131:5). He also admitted that the stakes pictured in Exhibits "E" and "F", were located in the middle of the forms set for constructing the wall (Record at 819 p.124:2-5), and that the footings and excavation to set them encroached on the Ottman property without Plaintiff's permission (Record at 819 pp.130:20-131:15). Mr. Baldwin even confirmed that the footings for his wall were ultimately poured in the forms shown in "E" and "F" (Record at 819 p.131:17-19).

Obviously the Defendants' err in their argument regarding the function of the stake pictured in trial exhibits "E" and "F". Since it is undisputed that the wall was ultimately poured in the forms that straddle the metes and bounds boundary of Baldwin/Ottman property, part of the wall, its footings, and excavation to the east of the wall were all on

the Plaintiff's property, and the lower court clearly erred in failing to make a finding consistent with those facts. The Court should reverse this finding.

II. The Baldwins trespassed on the Ottman property to construct their wall.

Because the lower court failed to find that the wall, portions of its footings and excavation encroached on Plaintiff's property without her consent, as a result it incorrectly concluded that the Baldwin's wall, and the associated excavation work east of the wall were not a trespass on the Ottman property. The Court should reverse this conclusion because it was based on a clearly erroneous finding.

III. The trial court incorrectly failed to conclude that a boundary by monument had been established along the old fence line.

In their brief, the Defendants failed to cite any facts to refute Plaintiff's cited facts in support of establishing the boundary by virtue of the monument rule. The Defendants did not even argue the point. Instead the Defendants argue a new theory that there were really two monuments, and the one that more closely matches the metes and bounds description should be deemed as the monument. This newly contrived theory was presented to the lower court for the first time during closing argument at trial (Record at 820: 375-75).

This new theory is certainly appealing since it appears to make it easy for the lower court to determine the location of the old fence line because there was no longer a monument in the ground after the Defendants ripped the fence out. The Defendants should not be able to get around the monument rule by simply removing the monument

and subsequently arguing that there were really two monuments. As addressed in the Brief of Appellant, and briefly addressed below, the new theory is founded entirely on evidence that is not credible.

This clever new theory is flawed because the Defendants did not establish the existence of a second monument, they only alleged that it was possible that there may have been one based on a solitary fence post never identified on any surveys, or at any time in the litigation until the second day of trial. In fact when asked about his knowledge of a possible second monument, Mr. Peterson admitted that he had no knowledge of the existence of a second fence:

> A. I believe that at one time, yes, there's a probably a different set of fences, or I don't think the 1956 fence is the same fence that Bob is measuring.
> Q. And how do you know that?
> A. **I don't know**. It's just my opinion.

(Record at 820 p. 303:1-5) (emphasis added). To the contrary, several witnesses for the Plaintiff have personal knowledge about the existence and the location of the old fence Plaintiff purports was the true boundary.

Defendants cite a case from the 1800s out of Missouri to support the idea that the monument rule would support their theory that the conjectured second fence could have t possibly ran along the metes and bounds description (Ziebold v. Foster, 24 S.W.155 (Mo. 1893)). Ziebold stands for the conclusion that if there is more than one monument currently in existence, then the one that more closely follows the metes and bounds

description should be the controlling monument. Defendant's argument presupposes the existence of multiple monuments. There was no witness that could attest to two monuments. All through the litigation in the lower court, and at trial, the Defendants have vehemently contested the existence of the old fence as a monument, only to turn around and conjecture that an alleged fence post not surveyed by either surveyor prior to five days before trial, and never seen by either party, somehow establishes a fixed monument. The idea is preposterous.

Defendants assert further in their brief that there were three monuments: the old fence line along the Pardoe boundary, the "newly discovered" fence post, and some wire and fencing remnants laying loose on the ground somewhere to the south of the property (Brief of Appellees p. 11) that was discovered for the first time on September 9, 2005 (Record at 820 p. 283:6-10). This idea is even bolder. It is amazing to consider a loose pile of junk laying on the ground to the south of the disputed boundary that was discovered days before trial to be interpreted as a monument, when the chain link fence post installed in the same post hole as the original old fence, verified by the location of the parallel irrigation line, is entirely disregarded.

The Defendants' new theory that there were multiple fences lines is inconsistent with trial testimony from their own expert. Dave Peterson admitted that when he was surveying the eastern boundary of Red Birch Estates, he observed remnants of an old fence separating the Plaintiff's and Defendants' property, but that he ignored the

monument rule (Record at 820 pp.313-314) when he platted the Red Birch Estates Subdivision and followed the metes and bounds description instead. He also admitted that he specifically instructed the Platts that the existence of the old fence that he had observed might create a boundary (Record at 820 p. 313:19-314:7-9), but that he ignored the old fence pursuant to instructions from the Platts
(Record at 820 pp. 314:7-315:1). Certainly Mr. Peterson would not have asserted that he was instructed by the Platts to ignore the fence line, if in fact, he were following it in the description of the subdivision plat boundary. Plaintiff's expert testified likewise that the old fence was ignored, and should have been observed as a monument marking the boundary (Record at 820 p. 226:1-16).

It is clearly undisputed that at trial both experts agreed that the monument rule preempts a conflicting bearing and distance description. The Defendants' expert admitted having found the old fence line when platting the Red Birch Estates subdivision, advising Defendants' predecessor in interest that it could create a boundary, then ignoring the old fence pursuant to the owner's instructions. The lower court adopted the Defendant's conjecture that there was at one time another fence line, but this is a misapplication of the monument rule. The United States Supreme Court addressed conflicting descriptions in boundary dispute out of Tennessee. Justice Marshall described the reasoning behind the monument rule:

> These difficulties have occurred frequently, and must be expected to occur frequently where grants are made without an actual survey. Some general rule of construction must be adopted; and that rule must be

> observed, or the conflicting claims of individuals must remain for ever uncertain.
>
> The courts of Tennessee, and all other courts by whom causes of this description have been decided, have adopted the same principle, and have adhered to it. It is, that **the most material and most certain calls shall control those which are less material, and less certain**. A call for a natural object, as a river, a known stream, a spring, or even a marked tree, shall control both course and distance.

Newsom v. Pryor's Lessee, 20 U.S. 7, 10 (U.S. 1822). This reasoning should be applied to the weight of evidence in the case at hand. Several witnesses testified regarding the existence of the old fence Plaintiff contends marked her western boundary (Shirley Ottman, Ken Howcroft, Marvin Widerberg, Mark Cherrington, Charles Cole, Robert Jones, David Peterson and Walter Goodwin). Most of these witnesses also provided evidence regarding the location of the fence as well. Not one witness ever saw any fence along the metes and bounds boundary in the disputed area between the parties' properties. Only one witness asserts there was a second line of fences, David Peterson, who admits he did not know if there was a second fence, but opined that there might have possibly been one at some time in the past based on his alleged discovery of a solitary free-standing post. It is obvious which fence is more certain to have existed. Clearly testimony of eight witnesses regarding the old fence is "most material and most certain" as compared to an imagined second fence. Consequently, the more certain physical evidence and testimony regarding the location of the old fence line Plaintiff believes is

the true boundary should control over a conflicting, less certain conjecture by Defendants' expert that there was possibly at one time another fence along the metes and bounds line.

The trial court incorrectly failed to conclude that a boundary by monument had been established prior to the development of Red Birch Estates. The trial Court's failure to observe the monument rule is reversible error.

IV. The actual location of the old fence line.

Weight of Testimony

Defendants attempt to disprove the great weight of evidence supporting the location of the old fence line. Defendants attempt to twist the testimony of Shirley Ottman by citing her agreement during cross-examination that the old fence began to deteriorate (Brief of Appellees p.15). The attempt is ineffective, Mrs. Ottman consistently testified that there was always a fence at the back of the property. Although she is an elderly lady and may not do as well with distances[1], she knew with a certainty that there was always a fence on the boundary, and even withstood opposing counsels repeated attempts to get her to say otherwise:

> Q. As to the exact location, you knew that a fence used to be back there?
> A. Yes.
> Q. But as to exactly where the fence was, you wouldn't be able to go back and -
> A. Yes, I would.
> Q. How would you be able to do that?
> A. Because I know where it was.

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1 Shirley admitted to not know the exact encroachment by the Baldwin wall, but opposing counsel asked her anyway, and she guessed that it was about 20 feet (Record at 820 p. 33:8-13). Interestingly, despite knowing that she claimed to not know the exact distance, the Defendants repeatedly refer to her 20-foot estimate as some kind of proof of an inconsistency in the location of the old fence.

(Record at 819 p. 32:15-22).

Defendants are trying on appeal to disprove Ken Howcroft's undisputed trial testimony regarding the location of the chain link fence that he personally installed. Ken put the northernmost post of his chain link fence in the very hole where an original old fence post had previously stood. (Record at 819 pp. 50:22-51:19). It would be impossible to more precisely place the new fence than to use the very hole in the ground left by the original old fence post. The Defendants provided no testimony regarding the location of this fence post, instead, Defendants attempt to confuse the court with testimony regarding the angle of the chain link fence in its entirety. The Brief of the Appellees repeatedly asserts that Ken Howcroft claimed that the chain link fence he erected was exactly on the old fence line, and ran on the same angle. This is not an accurate summary of Ken Howcroft's testimony. Ken Howcroft clearly testified that he installed the south end of the chain link fence on the east side of a mature tree to avoid having to go through the tree when constructing the fence (this is visibly obvious in picture exhibits 7, 8 and 9). So the chain link fence began to the east of the western boundary line of his mother's property (on Plaintiff's property) at the south end, but returned to the old fence line at its northern end where Ken personally placed a post in the same post hole where an old fence post previously stood.2 (Record at 819 pp. 53:3-54:11).

2 This deviation was erring in favor of the Baldwins, as shown by the photograph exhibits, the fence to the south (Farmbrook Estates) ran on the west side of the tree, but Ken Howcroft placed the chain link fence further on Plaintiff's property to avoid trespassing, even minimally, on Defendants' property.

In an effort to smokescreen Ken Howcroft's clear and unchallenged testimony, Defendants provide less relevant and less reliable testimony regarding the angle of the entire length of chain link fence. Defendants rely on lay opinion testimony from Walter Goodwin regarding a 1degree angle he claimed to observe by looking at 2 pictures taken from a window in 1993 and 1994, at a distance of 80 feet away from the boundary (Record at 819 p. 184:3-17). Mr. Goodwin's testimony is questionable at best. It would be very difficult, if not impossible for an observer to measure a one degree angle change based on two 4" photographs taken from inside a house 80 feet to the west of a fence with the alleged 1 degree discrepancy in its angle (from this perspective the fence runs left to right, or north to south). Interestingly, picture exhibits J and K, taken by the Goodwins, clearly show the posts of the old fence line extending northward from the north end of the chain link fence. This only solidifies the Plaintiff's position that the old fence line was, in fact, in line with and extending to the north from the north end of the chain link fence.

Defendants assert that Marvin Widerberg did not provide testimony "as to the location of any fence on the Platt property" (Brief of Appellees p. 19). This is not true. Mr. Widerberg provided detailed evidence of the location of the old fence line and the Defendants did not offer any evidence to refute it. Mr. Widerberg, who was the irrigation company president, testified that in 1986 he personally supervised the installation of the irrigation line approximately 4 feet west of the then standing old fence line (Record at 819 pp. 90:22-91:17, 94:6-13) and that the irrigation line installed in 1986 still lies about

4 feet west of the chain link fence, which was as close to the old fence as the back-hoe could dig the trench (Record at 819 pp. 95:4-96:2). Picture exhibits 12, 13 and 14 clearly verify that the irrigation line is currently located approximately four feet west of the northernmost post of the chain link fence.

This evidence is crucial because it is not only undisputed, but it clearly refutes the new theory that the old fence line actually ran seven feet further to the east of the chain link fence3. The evidence is affixed to the ground, and is irrefutable. The irrigation line is still buried where it was installed 20 years ago. It is inconceivable that a second fence running to the east of the chain link fence could possibly be the old fence line Actually in the ground and referenced in all of the deeds because Mr. Widerberg personally observed the installation of the irrigation line roughly four feet west of the old fence, and testified at trial that the line is currently about 4 feet west of the northernmost post of the chain link fence (see picture exhibits 12, 13 and 14, where Mr. Widerberg is standing near the marked location of the irrigation line four feet west of the end of the chain link fence).

If the Defendants' theory were adopted, and you were to attempt to reconcile it with Mr. Widerberg's testimony, it would mean that the irrigation pipe would currently run slightly to the east of the chain link fence, which it does not. It is undisputed that the irrigation line runs along the west side of the chain link fence.4 If the Defendants' theory

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3 At the south end of the disputed boundary, the Defendants projected line sits seven feet to the east of the Chain link fence pursuant to testimony from both Ken Howcroft and Kenneth Baldwin (Record at 819p. 62:23- 63:10) (101:306, 123:7-15)

4 This is why there is a gate in the fence to Farmbrook Estates (see picture exhibit 7) to allow easement access to service the irrigation line as necessary. This is consistent with Walter Goodwin's testimony that there was an easement that ran along the west side of the disputed boundary and through the Farmbrook Estates subdivision

were adopted, the irrigation line would be more than twice as far from the fence which it paralleled by approximately four feet when installed. At trial the Defendants presented no evidence regarding the location of the irrigation line. There is no way for the Defendants to refute this hard physical proof of the location of the old fence line relative to the buried irrigation line. The Court should reverse the lower court's finding in this regard as clearly erroneous since the lower court's finding is not only highly improbable, but it is physically impossible.

"Two Vectors, not "a Single Vector."

Defendants assert that "the directional call for the eastern boundary [of Red Birch Estates] is a single vector that does not change. "The call is for a length of 361 feet 'north 2° east' from the point of beginning." (See Brief of Appellees p.10). They contend that the boundary according to the Plaintiff would not match up with the metes and bounds call at the southernmost end. Defendants assert that the "legal description, however, evidences a single vector (north 2° east) for the entire length of the eastern boundary." See Brief of Appellees p.10.

In support of this "single vector" theory, Defendants claim: "David Peterson testified that the directional call describing the eastern boundary of the Platt Property was the same directional call that separated properties from Little Cottonwood Creek on the north to Creek Road on the South." However, Defendants fail to cite where such testimony was provided. To the contrary, Mr. Jones testified that the eastern boundary of

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(Record at 819 p. 166:8-15; see also Exhibit 10 – the recorded easement).

Red Birch Estates is comprised of two vectors each with a different bearing, he referred to the plat map (which David Peterson personally drafted):

> Go to the northeast corner, right there. That's where it comes. Okay. And then from there it runs south 1°20'15" west along said old fence line 340.348 feet and then south 2°00'40" west, 78.959 feet to the point of beginning. So this description begins down at that southeast corner and these three calls get it back to it, the first call of which is along an old fence line.

(Record at 820 p. 222:1-8). The metes and bounds description of Red Birch Estates clearly shows two distinct vectors that make up the eastern boundary: one runs south 1°20'15" west along an old fence line 340.348 feet and the second runs south 2°00'40" west, 78.959 feet to the point of beginning along the same fence line (see Trial Exhibit 9). That means that if the old fence line followed the metes and bounds description exactly, it was not straight. Despite the Defendants' assertion that 361 feet follow a 2° angle, only 78.9 feet follow a 2° angle, and the remaining 340 feet follow a 1°20'15" angle. Thus the boundary line took a slight turn in the disputed area. The old fence was likewise not perfectly straight.

In the Brief of Appellees, Defendants assert that "Mr. Peterson testified that 'further up here several hundred feet … we did find the remnants and it was right on the line." (5 Brief of Appellees p.11.) What line is that? Which vector was Mr. Peterson referring to? The trial transcript is unclear, and certainly the remnants could not have been in line with both vectors. Mr. Peterson's statement is all the more questionable

since there was no evidence provided by either side as to what the legal description of the fence line south of Farmbrook Estates was.

The fact that the fence did not run along a straight line is entirely consistent with trial testimony, where Mr. Peterson testified that he found remnants of the old fence line that bowed from the metes and bounds line (Record at 820 p. 280:9-16). Apparently not only was the old fence line not one straight vector, but according to the Defendants' expert, it bowed away from the metes and bounds line.

V. The lower court should have considered Mr. Peterson's conflicting testimony read during closing argument.

Although Mr. Peterson testified that he had surveyed all fences in his 1996 survey, his survey did not include the fence post he plots on a map for the first time on September 9, 2005, just a few days before trial (in a location beneath where the wall was standing at the time it was plotted). In opposition to Plaintiff's position that the prior testimony should have been considered, the Defendants assert that Plaintiff's counsel is the one who "changed his position" (Brief of Appellees p. 27). The brief of the Appellees asserts that Mr. Tycksen made a statement that Mr. Peterson's testimony at trial "was basically what he said in his deposition." There is no citation in Brief of Appellees as to where this statement was made. The partial citation misconstrues the exchange between Plaintiff's attorney and Mr. Peterson, which was regarding the Farmbrook Estates fence line, as follows:

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5 It is amazing that remnants laying on the ground hundreds of feet from a disputed boundary line could be considered as credible since remnants are easily moved.

Q. Well isn't that basically what you said in your deposition?
A. Uh-huh (affirmative).
Q. That you agree that the Farmbrook Estates does follow the old line?
A. Relatively close.

Record at 820 p. 308:10-15). Counsel for the Plaintiff did not assert that the testimony regarding a second fence "was basically what he said in his deposition." The Defendants took only a piece of an exchange to support a completely separate issue. Interestingly, if the Farmbrook Estates fence follows the old fence line relatively close, and it sits several feet to the west of the chain link fence (due to the tree – see picture exhibits 7, 8 and 9), and even further from where the Defendants assert a hypothetical old fence line may have once stood, Mr. Peterson once again acknowledged that the chain link fence, installed by the Plaintiff's son, is closer to the actual old fence line than is a second hypothetical fence to the east of it.

Mr. Tycksen has consistently argued that Mr. Peterson changed his position, and that is why he insisted on reading from the deposition during closing argument. Defendants contend that the Plaintiff was not prejudiced by the Court's refusal to consider the deposition testimony because Mr. Tycksen actually read it. This is inaccurate. The court clearly indicated that it was not going to receive or consider the evidence:

> THE COURT: Yeah, that is a problem. You can't refer to his preliminary injunction testimony or his deposition testimony unless it was admitted into evidence in this case.
> Mr. TYCKSEN: Your honor, both of those, both of those were published in this case.
> . . .

> THE COURT: They're not, they're not published. They're not part of the record in this case. They're not part of the evidence in this case, unless they're read in this case.

(Record at 820 p. 353: 11-23).

As illustrated in the Brief of the Appellant, and not refuted by the Defendants in Brief of Appellees, the trial court mistakenly believed opposing counsel when opposing counsel claimed that Mr. Peterson was never asked during cross-examination at trial about his conflicting deposition testimony stating that the eastern fence of Farmbrook Estates is consistent with the old fence line and the eastern boundary of Red Birch Estates (Record at 820 pp. 354:6-355:14). David Peterson's testimony during deposition was that the eastern boundary of Farmbrook Estates (situated to the south of Defendants' property) followed the old fence line (Record at 821 pp. 71:18 – 72:3). Mr. Tycksen read this very language to Mr. Peterson during cross-examination at trial, and Mr. Peterson acknowledged that he testified that the eastern fence of Farmbrook Estates followed the old fence line at least on the north side (the side abutting the disputed boundary – from which the chain link fence extends) (Record at 820 pp. 305:12 – 307:7). However, upon Defendants' objection during Plaintiff's closing argument, the court mistakenly agreed with opposing counsel that such a line of questioning did not come in during cross-examination (Record at 820 p. 354:6-15).

Not only did the trial court explicitly ignore this evidence, it appears that it ignored this fact when making its oral findings and conclusions. If the boundary of Farmbrook

Estates was in line with the old fence line (as affirmatively testified by both sides – by Ken Howcroft: Record at 819 p. 46:11-47:3, and by Dave Peterson: Record at 820 p. 290:16-291:6, 305:25-306:14), it would preclude any possibility of the existence of a duplicate fence to the east of that boundary as being the old fence described in the deeds to the parties' properties, and it would solidify Plaintiff's case that the old fence line extended north from the northeast corner of Farmbrook Estates to the corner of the Pardoe property. The lower court erred by failing to consider this evidence, since it was properly introduced, and it unequivocally disproved Mr. Peterson's newly created theory.

Based on the evidence on this issue, the Court should consider the evidence summarized in Plaintiff's closing argument showing that Mr. Peterson's new theory that there was a second diverging fence line was in direct conflict with his prior testimony. This should lead the Court to conclude that Mr. Peterson's new theory is not credible.

REQUEST FOR ORAL ARGUMENT

The arguments made in this brief are much easier to understand when the exhibits are used and diagrams can assist the Court in getting a clear picture of the layout of the land. The Plaintiff/Appellant respectfully requests a hearing for oral argument on the issues presented in this appeal.

CONCLUSION

Trial testimony from both sides clearly establishes that the Defendants' wall is constructed in part on Plaintiff's property, and such constitutes a trespass.

The Defendants' newly contrived theory of a second fence is based entirely on the hypothetical conjecture of Defendants' expert and is contrary to Plaintiff's unchallenged evidence as to the precise location of the old fence line. Based on the unchallenged testimony Plaintiff presented at trial, the lower court erred when it failed to find that a boundary had been created by monument long before the Defendants acquired their property.

There was no evidence at trial that there were two monuments, and the clever idea that there were two competing fences flies in the face of the weight of evidence presented at trial.

The Plaintiff presented unchallenged testimony from Ken Howcroft that the northernmost post of the chain link fence he personally installed was buried in the very same posthole where the old fence post was removed. Plaintiff also provided the testimony of Marvin Widerberg regarding the precise location of the old fence parallel to an irrigation line he saw installed in 1986. The Defendants presented no evidence to challenge the substance of these witnesses.

Contrary to Defendants' contention, the old fence, as well as the boundary call for Red Birch Estates, does not follow a single straight vector. The evidence presented at trial

unquestionably supports Plaintiff's position that the boundary simply connects the property to the north with the property to the south, passing through the undisputed location of one of the old fence posts from the original old fence line (bowing slightly to the west).

The lower court should have considered conflicting testimony of Defendants' expert when Plaintiff's attorney read part of Mr. Peterson's deposition during closing argument that he had previously read during cross-examination. The portion of the deposition read in cross-examination unquestionably refutes the Defendant's new theory of a second fence and the possibility of two monuments. Furthermore, additional portions of prior testimony that Plaintiff's attorney read during closing argument reveal the truth regarding the Defendant's changing theories.

Based on the foregoing, the Court should reverse the trial court and establish the boundary along the old fence line running from the corner of the Pardoe property through the location of the northern end of the chain link fence, and ending at the corner of Farmbrook Estates. The court should remand this matter for a hearing to determine the damages incurred by Plaintiff due to Defendants' trespass, including Plaintiff's attorney fees and costs incurred on appeal.

DATED this 22 day of December 2006.

Chad C Shattuck
Attorney for the Plaintiff/Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing, **Reply Brief of Appellant**, postage pre-paid to the following:

Russell A. Cline
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on this 12 day of December 2006.